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No. 240

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1933.

FEDERAL TRADE COMMISSION,
Petitioner,

vs.

ALGOMA LUMBER COMPANY,
BIG LAKES BOX COMPANY,
CALIFORNIA FRUIT EXCHANGE,
CLOVER VALLEY LUMBER COMPANY,
DAVIES-JOHNSON LUMBER COMPANY,
DIAMOND MATCH COMPANY,
EWAUNA BOX COMPANY,
FEATHER RIVER LUMBER COMPANY,
HOBART ESTATE COMPANY,
LASSEN LUMBER & BOX COMPANY,
PELICAN BAY LUMBER COMPANY, and
RED RIVER LUMBER COMPANY,
Respondents.

Brief for Respondents in Opposition to Petition for Writ of Certiorari.

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No. 240

In the Supreme Court
OF THE
United States

October Term, 1933.

Federal Trade Commission,
Petitioner,

vs.

Algoma Lumber Company,
Big Lakes Box Company,
California Fruit Exchange,
Clover Valley Lumber Company,
Davies-Johnson Lumber Company,
Diamond Match Company,
Ewauna Box Company,
Feather River Lumber Company,
Hobart Estate Company,
Lassen Lumber & Box Company,
Pelican Bay Lumber Company, and
Red River Lumber Company,
Respondents.

Brief for Respondents in Opposition to Petition for Writ of Certiorari.

INTRODUCTORY.

By its petition in this cause the Federal Trade Commission seeks a review of a decision of the United States Circuit Court of Appeals for the Ninth Circuit which annulled orders made by the Commission in a group of related trade nomenclature cases. The Commission's orders condemned the use of "California White Pine" as the commercial name for respondents' lumber. The court concluded that the record in the proceedings before the Commission was insufficient to support the Commission's findings that the use of the commercial name "California White Pine" is "an unfair method of competition or that its prevention would be in the interest of the public." (R. 1899). The sole question now pending is whether such "special and important reasons" have been shown by petitioner as would warrant this Court, in the exercise of its discretion, in granting the writ sought by the petition (Supreme Court, Rule 28 (5)).

Preliminarily attention should be directed to the failure of the petition to state or suggest a case falling within the terms or purpose of the Federal Trade Commission Act. In the case of

> *Federal Trade Commission v. Raladam Co.*, (1931) 283 U. S. 643; 51 Sup. Ct. Rep. 587; 75 L. ed. 1324,

this Court has pointed out that Section 5 of the Federal Trade Commission Act is "supplementary to the Sherman Anti-Trust Act and the Clayton Act" and has declared that

> "the paramount aim of the Act [Federal Trade Commission Act] is the protection of the public from the

> evils likely to result from the destruction of competition or the restriction of it in a substantial degree * * *."

It is significant, therefore, that the pending petition contains no averment or intimation

> (1) that the respondent lumber companies have offended against the Sherman Anti-Trust Act or the Clayton Act; or
>
> (2) that the respondent lumber companies have attempted or conspired to destroy or restrict competition; or
>
> (3) that the name "California White Pine" was adopted for the purpose of misleading or deceiving the trade or the public, or for any other unlawful or improper purpose.

Not only does the pending petition fail in these respects, but the record in the proceedings before the Commission, as well as the Commission's findings, are similarly deficient.

Counsel for the Federal Trade Commission has formally stipulated of record that "no conspiracy among these several respondents being [is] charged or proved herein". (R. 26).

Counsel for the Federal Trade Commission has likewise admitted, upon brief filed before the Commission in these proceedings, that "there is no proof that the practice of designating *ponderosa* products by terms including the word 'white' was adopted for the purpose of misleading or deceiving the trade or the public".

The conclusion is impelled that neither the record before the Commission nor the Commission's findings can suffice to make out a case cognizable by the Commission under the Federal Trade Commission Act. No such case is tendered by the petition herein.

STATEMENT OF FACTS.

Before addressing ourselves to the several questions of law presented by the petition we shall offer a brief analysis of essential and undisputed facts. We shall attempt to state them in terms which cannot be subject to challenge.

1. "California White Pine" is the commercial or trade name under which the lumber yielded by the tree identified botanically as *Pinus ponderosa* has been marketed throughout the United States for more than 32 years last past. (In the Pacific Coast area since 1886 and nationally since 1900.)

2. "California White Pine" was adopted as the commercial name for this lumber in order to distinguish it from the typical "yellow pine" lumbers of the southern states. (It is stated upon page 5 of the petition that "the original purpose for the adoption of this term was to distinguish this lumber from the hard 'yellow pine' of the South".)

3. The *Pinus ponderosa* tree is conventionally assigned by botanists to the so-called "pinaster" or yellow pine group, but the lumber which it yields belongs with the white pine lumbers in mechanical properties and industrial utility. (The following is quoted from page 9 of the petition: "This is botani-

cally a yellow pine but, from the standpoint of its industrial uses, is more closely allied with white pine.")

4. The botanical grouping of pine *trees* has no relation to the commercial nomenclature or industrial utility of pine *lumbers*.

5. The pine lumbers of the United States have been placed by trade and industry in two groups—viz., the white pine group and the yellow pine group. "California White Pine" has always been known to trade and industry as a white pine lumber. It is far removed from typical yellow pine lumbers in mechanical properties and industrial utility.

6. "California White Pine" has been formally adopted and recommended as a "preferred commercial name" for this lumber by the Bureau of Standards of the United States Department of Commerce. This recommendation has been accepted by the major organizations of the lumber industry and by the American Institute of Architects.

Upon the record before the Commission it is indisputable that the name "California White Pine" came naturally and honorably into being; that it has received the considered approval of a Department of the Federal Government, and that it has never been used by respondents for a fraudulent or dishonest purpose throughout the period of more than 30 years during which the name has become firmly established in trade and industry throughout the United States.[1]

(1) The complaints before the Commission contain certain charges of sinister motive and improper practice, but such charges wholly failed of proof. All have been abandoned, either expressly or tacitly.

The pending petition does not allege, nor does the record contain any proof,

(a) that the respondent lumber companies have offended against the Sherman Anti-Trust Act;

(b) that the respondent lumber companies have violated the Clayton Act;

(c) that "California White Pine" was adopted or has been used with intent to deceive, for the purpose of trading upon another's name, for the purpose of destroying or injuring the business of a competitor, or for the purpose of misleading the public.

Neither fraud, intent to deceive, nor dishonesty in any form has been proved or found by the Commission or alleged in the pending petition.

The petition alleges "confusion" through the use of the term "California White Pine" and suggests that the public is misled. There are also averments of relative inferiority. These are offered to justify the intervention of the Commission, and its attempt to compel a change in the commercial name for respondents' lumber. We shall show that these cannot suffice to make out a case cognizable by the Commission or warranting the issue of a writ of review by this Court.

NATURE OF JURISDICTION CLAIMED BY THE COMMISSION.

The real character of the authority claimed by the Commission and which it attempted to exercise in these pro-

ceedings is disclosed by the following excerpt from page 10 of the pending petition:

> "In other words, does the Federal Trade Commission Act authorize the Commission, where a commercial name was originally adopted without improper motive or purpose, to compel use of more accurate and specific commercial names than those heretofore employed?"

We note the concession that respondents' commercial name "was originally adopted without improper motive or purpose". Nevertheless the Commission claims the right "to compel use of more accurate and specific commercial names". Such is the far-reaching power which the Commission has sought to exercise, and which has repeatedly encountered judicial disapproval. The refusal of the Circuit Court of Appeals in this cause to recognize such authority in the Commission is in conformity with authoritative pronouncements of this Court, which we shall shortly review.

DECISION OF UNITED STATES CIRCUIT COURT OF APPEALS.

The opinion of the Circuit Court of Appeals (R. 1889-1899, incl.) is reproduced for the convenience of the Court in the Appendix to this Brief. Upon consulting the text of the opinion it will be found that the court kept scrupulously within its proper jurisdiction, and expressly refrained from entering the province of the Commission. The third paragraph of the opinion reads as follows (R. 1889-1890):

> " 'To sustain the orders of the Commission three requisites must exist: (1) That the methods used are

unfair; (2) that they are methods of competition in interstate commerce; and (3) that a proceeding by the Commission to prevent the use of the methods appears to be in the interest of the public.' Federal Trade Commission v. Royal Milling Co., ... U. S. ..... (decided February 6, 1933); Fed. Trade Comm. v. Raladam Co., 283 U. S. 643, 646-647. That the use of the expression, 'California white pine', is a method of competition, there is no question. The only questions presented are whether requisites (1) and (3), found by the Commission to exist, are supported by the testimony. If so supported, the statute provides that such findings 'shall be conclusive.' (Fed. Trade Comm. v. Winsted Hosiery Co., 238 U. S. 483, 491.)"

After reviewing the record and the findings of fact of the Commission, the court reached the following conclusion (R. 1899):

> "It is the conclusion of the court that, viewing the testimony in the light of all the facts of the case, it is insufficient to support findings that petitioners' use of the commercial name 'California White Pine' is an unfair method of competition or that its prevention would be in the interest of the public."

Certainly no excess of jurisdiction on the part of the court is here indicated.[1]

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(1) It is well settled that the ultimate determination of what constitutes "unfair methods of competition" is for the courts and not for the Commission:

Federal Trade Commission v. Curtis Publishing Co. (1923), 260 U. S. 568; 43 S. Ct. 210; 67 L. ed. 408.

Temple Anthracite Coal Co. v. Federal Trade Commission (1931), 51 Fed. (2d) 656.

Obviously, such a conclusion of ultimate fact cannot be withheld from judicial review by the device of wording it in the language of a finding, for by whatever name it be denoted, it must remain a question for the court.

REPLY TO REASONS ADVANCED BY PETITIONER FOR GRANTING WRIT OF CERTIORARI.

We shall comment in turn upon the several reasons advanced by petitioner for the review of this decision upon certiorari.

I.

AUTHORITY OF THE FEDERAL TRADE COMMISSION OVER COMMERCIAL NOMENCLATURE.

The petitioner suggests that the initial question which it desires to present has not been, but should be, decided by this Court. It is our view that the point has been repeatedly and authoritatively determined by this Court, and adversely to petitioner's contentions.

We have heretofore reproduced the petitioner's claim that it has authority, "where a commercial name was originally adopted without improper motive or purpose, to compel the use of more accurate and specific commercial names than those theretofore employed" (Petition p. 10). The power thus claimed in behalf of the Commission would sanction a general revision of trade nomenclature, whenever the Commission might be moved to devise what in its opinion might be "more accurate and specific commercial names". It matters not that the respondents have not offended against the Sherman Anti-Trust Act or the Clayton Act. It matters not that the respondents are not chargeable with fraud, with intent to deceive, with design to injure a competitor, or with any other improper motive or purpose.

The very terms in which petitioner's contention is phrased will suffice to condemn it. No such far-reaching

censorship over trade names has been conferred upon the Commission. Upon this point the decisions are clear.

In *Federal Trade Commission v. Raladam Co.*, supra, (a decision which has served notably to clarify the law on this subject) this Court said:

> "In a case arising under the Trade Commission Act, the fundamental questions are, whether the methods complained of are 'unfair', and whether, as in cases under the Sherman Act, they tend to the substantial injury of the public by restricting competition in interstate trade and 'the common liberty to engage therein'. The paramount aim of the act is the protection of the public from the evils likely to result from *the destruction of competition or the restriction of it in a substantial degree,* * * * " (Emphasis added.)

The unfair methods mentioned in the Act are

> "those resorted to for the purpose of destroying competition or of eliminating a competitor or of introducing a monopoly—such as tend unfairly to destroy or injure the business of a competitor."

Heretofore the Commission has recognized no such limitation upon its powers, but has assumed the widest range of discretion, attempting to exercise its corrective processes in fields far removed from the terms and purposes of the Trade Commission Act as now authoritatively established by this Court. As was pointed out by the court below, this Court, in the case of

> *Federal Trade Commission v. Sinclair Refining Co.*, (1923) 261 U. S. 463, 43 S. Ct. Rep. 450, 67 L. ed. 746,

declared that

> "The great purpose of both statutes was to advance the public interest by securing fair opportunity for the play of the contending forces ordinarily engendered by an honest desire for gain. And to this end it is essential that those who adventure their time, skill and capital should have large freedom of action in the conduct of their own affairs."

The Circuit Court of Appeals for the Second Circuit has characterized the purpose of the Federal Trade Commission Act as follows:

> "Its purpose is to strike down at their inception practices which are unfair and which, if permitted to run their full course, would result in the creation of a monopoly and an undue restraint of trade." (*Northam Warren Corporation v. Federal Trade Commission*, (1932) 59 F. (2d) 196, 198.)

The petitioner claims "confusion" in the public mind because of the use of this trade name. Upon analysis it will be found that the alleged confusion is little more than ignorance as to the botanical identity of the several trees yielding lumber which is marketed under white pine names. This is not such confusion as will sustain a claim of unfair competition.

The petitioner cites the decision of this Court in

> *Federal Trade Commission v. Winsted Hosiery Company* (1922), 258 U. S. 483; 42 S. Ct. Rep. 183; 66 L. ed. 729.

That case cannot be assimilated to the instant case. There the offending manufacturer had, with express design,

adopted labels for his goods, which were "indubitably false". There was intent to defraud, and the public was in fact defrauded and business competitors were injured. The instant case is in no sense a counterpart, as the court below distinctly recognized. Petitioner admits that respondents' commercial name "was originally adopted without improper motive or purpose". Petitioner admits that the name was not adopted "for the purpose of misleading or deceiving the trade or the public". There is neither fraudulent purpose nor fraud in fact. The Commission has not attempted to make findings to that end.[1]

Unless it appears that the respondent has offended against the terms or purpose of the Anti-Trust Act or the Clayton Act, or that his course of conduct is motivated by intent to deceive or to defraud the public or to injure competitors, no jurisdiction exists to compel revision of trade nomenclature.

It would therefore seem clear that the initial reason advanced by the petitioner is invalid, for the point has already been determined adversely to petitioner's claim. The Circuit Court of Appeals correctly concluded, upon the record before the Commission, that the use of "California White Pine" as the commercial name for respondents' product, is not an unfair method of competition. This conclusion was within the province of the court.

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(1) That fraudulent intent is a necessary ingredient of unfair competition is amply shown by the authorities:
Elgin National Watch Co. v. Illinois National Watch Co. (1901), 179 U. S. 665, 674; 45 L. ed. 365.
Howe Scale Co. v. Wyckoff, Seamans, etc. (1905), 198 U. S. 118, 140; 49 L. ed. 972.

II.

THE INTEREST OF THE PUBLIC

The second issue tendered by the petition is in effect a challenge to the conclusion of the court that the action of the Commission was not in the interest of the public. The point is not so phrased, but such is the purport of petitioner's reasoning. In the language of the petition, the question presented is "whether the statutory requirement that a proceding be in the public interest permits the Commission or the court to consider the general social or economic facts which may indirectly result from the Commission's order" (Petition p. 11).

In this the petition fails aptly to state or fairly to characterize the substance of the opinion of the Circuit Court of Appeals in dealing with the question of the public interest. *That court specifically found, upon a review of the record, that the evidence before the Commission was insufficient to show that action by the Commission to force a change in this long-established trade name was in the public interest.* The court examined the evidence and considered the Commission's findings, and advisedly reached a conclusion adverse to the Commission upon this jurisdictional question.

As a mere incident to this conclusion the court observed that the public is not only interested in not being deceived in the material it purchases under a certain nomenclature, "but possibly in an even larger sense in the conservation of the forests" (R. 1890). It is in this remark that petitioner purports to find the indicia of an excess of jurisdiction on the part of the court.

At the worst, the observation thus made by the court was surplusage, and could not possibly be judicial error. It was enough that the court found that the evidence before the Commission was insufficient to support its findings with respect to unfair methods of competition and with respect to the public interest. These are the jurisdictional prerequisites, and it was immaterial, at most, that the court suggested further considerations militating against the propriety of the Commission's action (4 *Corpus Juris* 1057).

We have pointed out that the generic grant of authority to the Commission to forbid unfair methods of competition in commerce confers no license to traverse the fields of trade and industry and compel the revision of trade names which it may find objectionable for one reason or another. It is not enough that the challenged practice may appear to the Commission to be misleading or confusing. It cannot be stated too emphatically that the prerequisites to action on the part of the Commission comprehend not only (a) the existence of unfair methods of competition in commerce, but also (b) a determination that action on the part of the Commission is "to the interest of the public".

The meaning of these terms has been definitely charted by the decision of this Court in the *Raladam* case supra. It is there held that "unfair methods" are "*those resorted to for the purpose of destroying competition or eliminating a competitor or of introducing a monopoly—such as tend unfairly to destroy or injure the business of a competitor*". It is also there held that the words "to the interest of the public" "*are not substantive words of jurisdiction but*

complementary words of limitation upon the jurisdiction conferred by the language immediately preceding". It is not enough "that a given person, partnership or corporation has been or is using any unfair method of competition in commerce". The court declares that "the Commission still may not proceed, unless it further appear that a proceeding would be to the interest of the public, and that such interest is specific and substantial".

Accordingly, the Commission may not insist that its action is "to the interest of the public" in any case wherein the record fails to show a public interest which is "specific and substantial". It was the holding of the Circuit Court of Appeals that no such public interest appears in respect to the practice of these respondents. This was a proper question for judicial determination, and the ruling is not impaired by harmless collateral comment.

III.

ALLEGED EXCESS OF JURISDICTION BY CIRCUIT COURT OF APPEALS.

Petitioner has phrased its third point in the following terms (Petition p. 13):

> "A further reason for granting the writ of certiorari is that this is a case where large interests are involved and where the court below failed to observe the statutory provisions governing judicial review of orders of the Commission."

The fact that "large interests are involved" affords insufficient reason for the review of a decision upon certi-

orari. If it should appear, however, that the court below failed to observe the statutory restraints upon its reviewing authority, the intervention of this Court could properly be invoked. We shall proceed to show that the court below did not exceed the limits of its authority.

It is true, as the petition points out, that the Commission's findings of fact are conclusive "if supported by testimony". We agree also that the weight to be given to the facts, as well as the inferences reasonably to be drawn from them, are matters for the Commission. But the Circuit Court of Appeals expressly recognized these limitations upon its reviewing authority, as the text of its opinion clearly discloses. The court undertook only to determine (a) whether the record before the Commission could support a finding of unfair competition and (b) whether the record and findings sufficed to show that the intervention of the Commission was in the public interest. As we have hitherto pointed out, this Court has expressly ruled that "the ultimate determination of what constitutes unfair competition is for the court, not the Commission".

Federal Trade Comm. v. Curtis Publ. Co., supra.

It is suggested in the concluding portion of the petition that there is a tendency on the part of the courts to weigh evidence and to set aside the Commission's orders when their views as to preponderance differ from those of the Commission (Petition p. 15). If there is such tendency on the part of any court, it is not exemplified by the decision of the Circuit Court of Appeals in this case. There is nothing whatever in its opinion which can support the criticism that it has assumed either "to weigh

the evidence" or to formulate its own "views as to preponderance". It did make passing comments upon the significance of certain of the Commission's findings of fact, but the evidentiary findings of the Commission were not disturbed. Not one such finding was either set aside or modified. Nor did the court make findings of its own, either in substitution for findings of the Commission, or otherwise. Certainly, passing comments upon the findings, and upon the record itself, are entirely appropriate, and do not constitute an invasion of the province of the Commission.[1]

The fact is that the court below reviewed the testimony only for the purpose of ascertaining whether such testimony could be held to support the Commission's conclusions upon the *ultimate questions* involved in these proceedings, (1) whether respondents' practice was unfair, and (2) whether action by the Commission would be in the public interest. The court expressly recognized the finality of the Commission's findings of fact, when supported by testimony, and sought only to determine whether those findings are supported by evidence, and whether they sustain the Commission's conclusions upon these ultimate questions. Such inquiries were within the province of the reviewing court.[2]

Since the petition fails to identify a single specific instance wherein the court set aside or disturbed an evi-

(1) The Commission made no finding in respect to the adoption and recommendation of "California White Pine" as a "preferred commercial name" for this lumber by the United States Bureau of Standards. The court below commented upon this phase of the record, but again refrained from making a finding of its own.

(2) The distinction between "ultimate facts" and "evidentiary facts" is, of course, well understood.

Temple Anthracite Coal Co. v. Federal Trade Commission, supra.

dentiary finding upon the ground that it was unsupported by testimony, it would appear that petitioner cannot justly assert or imply that the court failed to observe the accepted limitations upon its jurisdiction.

CONCLUSION.

It has been said by a former Chief Justice of this Court that the office of the writ of certiorari is "to secure uniformity of decisions in subordinate courts of appeal and to decide questions of general, public importance which are not well settled" (Volume VIII, *American Bar Association Journal,* 603).

Hamilton-Brown Shoe Company v. Wolf Bros., (1916) 240 U. S. 251; 60 L. ed. 629.

The petition for certiorari herein fails to present a case responding to these requirements.

It presents no conflict between different circuits.

It tenders no questions of "general, public importance which are not well settled". On the contrary, it seeks to reopen questions which have been authoritatively settled by this Court.

The petition does not represent, nor does the record before the Federal Trade Commission in these proceedings show,

(1) That respondents have offended against the Sherman Anti-Trust Act or the Clayton Act; or

(2) That respondents have attempted or conspired to destroy or restrict competition; or

(3) That the commercial name used by respondents for their lumber (established through the United States for more than thirty years) was adopted for the purpose of misleading or deceiving the trade or the public or for any other fraudulent or improper purpose.

The petition for certiorari should be denied.

Respectfully submitted,

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Dated at San Francisco, California, August 31, 1933.

ENTRY OF APPEARANCE.

The undersigned hereby enter their appearance in the above entitled cause as counsel for respondents.

Dated at San Francisco, California, August 31, 1933.

WARREN OLNEY, JR.,
ALLAN P. MATTHEW,
CARL I. WHEAT,
Attorneys for Respondents.

(APPENDIX FOLLOWS.)

Appendix

Opinion of the Circuit Court of Appeals (R. 1889-1899.)

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 6716

[Apr. 4, 1933]

ALGOMA LUMBER COMPANY ET AL., PETITIONERS

vs.

FEDERAL TRADE COMMISSION, RESPONDENT

Petition to review orders of the Federal Trade Commission
Before: WILBUR, Circuit Judge, and JAMES and NORCROSS, District Judges

Opinion

Filed April 4, 1933

NORCROSS, District Judge:

The petition presents for consideration a review of orders made by the Federal Trade Commission on June 8, 1931, in the so-called "White Pine cases" requiring the petitioning lumber manufacturers to cease and desist from using the word "white" in conjunction with the word "pine" in connection with the sale in interstate commerce of lumber manufactured from the species of pine tree botanically known as Pinus ponderosa.

Petitioners herein are twelve of a group of fifty manufacturers on the Pacific coast, against which the Commission issued similar complaints on May 23, 1929. Each of these concerns was charged with the interstate sale of lumber under various terms, including the phrase, "white pine", with the alleged result of misleading and deceiving the trade and public to the injury of competitors and the public, and that the same is an "unfair method of competition forbidden by section 5 of the Federal Trade Commission Act." The term employed by each of petitioners here is "California white pine."

"To sustain the orders of the Commission three requisites must exist: (1) That the methods used are unfair; (2) that they are methods of competition in interstate commerce; and (3) that a proceeding by the Commission to prevent the use of the methods appears to be in the interest of the public." Federal Trade Commission v. Royal Milling Co., ... U. S. .... (decided February 6, 1933); Fed. Trade Comm. v. Raladam Co., 283 U. S. 643, 646-647. That the use of the expression, "California white pine", is a method of competition, there is no question. The only questions presented are whether requisites (1) and (3), found by the Commission to exist, are supported by the testimony. If so supported, the statute provides that such findings "shall be conclusive." (Fed. Trade Comm. v. Winsted Hosiery Co., 258 U. S. 483, 491.).

In Federal Trade Commission v. Raladam Co., 283 U. S. 643, the Supreme Court said:

"In a case arising under the Trade Commission Act the fundamental questions are, whether the methods com-

plained of are 'unfair', and whether, as in cases under the Sherman Act, they tend to the substantial injury of the public by restricting competition in interstate trade and 'the common liberty to engage therein.' The paramount aim of the act is the protection of the public from the evils likely to result from the destruction of competition or the restriction of it in a substantial degree, * * *."

In Federal Trade Commission v. Sinclair Refining Co., 261 U. S. 463, the Court said:

"The general purpose of both statutes was to advance the public interest by securing fair opportunity for the play of the contending forces ordinarily engendered by an honest desire for gain. And to this end it is essential that those who adventure their time, skill, and capital should have large freedom of action in the conduct of their own affairs."

This Court in Hills Bros. v. Fed. Trade Comm., 9 F. (2d) 481, 484, said:

"The Court is only concerned with the question whether there is any competent testimony to support findings of the Commission."

Pinus ponderosa belongs botanically with the so-called "yellow pine" group. The typical "yellow pine" is the longleaf pine of the South, a hard lumber useful where strength is needed, and classified botanically as Pinus palustris and Pinus taeda. When lumber from the Pinus ponderosa trees came into local use in California it was given the name "California white pine" in order to distinguish it from the hard "yellow pines" of the South. By 1886 it was so marketed in the States of California, Nev-

ada, and Utah, with occasional shipments further east. By about 1900 it was so marketed in the Middle West sections, and about 1915 shipments extended to the Atlantic coast.

The only species of true botanical white pines of commercial importance are northern white pine, and two Pacific coast varieties—Idaho white pine and sugar pine. The annual production of northern white pine in the United States is 825,000,000 feet b. m., of which 358,000,000 feet is from virgin timber in Minnesota, the remainder, 467,000,000 feet, being in the main second growth from the original forests stretching throughout the northern and eastern sections of the United States from Minnesota to the Atlantic coast. The annual production of Idaho white pine is 500,000,000 feet and of sugar pine 280,000,000 feet. The annual production of ponderosa is 2,800,000,000 feet, of which more than half has been sold since 1924 as pondosa pine and the remainder as California white pine, Arizona white pine, and New Mexico white pine.

Prior to 1924 the majority of Washington, Idaho, western Montana and northern and central Oregon producers of ponderosa were designating their lumber western white pine. Upon application for complaints against them the Commission investigated this trade term. As a result of an agreement entered into by most of such producers in that year the name pondosa pine was adopted as a substitute. In the brief of counsel appearing as amicus curiae is the statement that following the said orders of the Commission of June 8, 1931, the name was again changed to ponderosa pine.

Statistical Bulletin #21 of United States Department of Agriculture (commission's exhibit 34) gives a statement of the total timber stand in the United States for the year 1920 in board feet as follows:

Pinus ponderosa (California white pine) and Pinus jeffreyi (Jeffrey pine), 249,578,000,000.

Pinus strobus (northern white pine) and Pinus resinosa (norway pine), 23,457,000,000.

Pinus monticola (Idaho white pine) and Pinus lambertiana (sugar pine), 57,071,000,000.

From the foregoing it appears that the available supply of ponderosa and its kindred Jeffrey pine is about three times greater than the total available supply of the botanically true white pine timber in this country. The record also discloses an estimate of more than 15,000,000,000 board feet of northern white pine (strobus) within the Canadian Provinces. At the rate of consumption given, not considering second growth, the present stand of timber will be practically exhausted within sixty years.

In respondent's exhibit #31—"U. S. Department of Commerce Bureau of Standards — Lumber — Simplified Practice Recommendation R 16-29" (issued December 5, 1929), there appears under the heading "Nomenclature of commercial softwoods" the statement:

"The following standard commercial names for lumber cut from the principal species of softwoods shall be used in the formulation of lumber-grading rules and in the construction of contracts and the terms of purchase and sale of American standard lumber. Preferred commercial names are shown in italic."

Here follows under subheadings of various names of trees such as cedars, firs, hemlocks, etc., the standard commercial name of lumbers produced therefrom. Under the subheading Pines appear sixteen names, the following among others: Arkansas soft pine, California white pine, Idaho white pine, longleaf pine, North Carolina pine, northern white pine, norway pine, pondosa pine, southern pine, sugar pine. Placed opposite each such standard commercial name is the proper botanical name or designation. Of the sixteen names, ten are of the botanical yellow pine. While commercially pine lumber falls within two main groups—the white and the yellow pines—it may be noted that the Bureau of Standards in the exhibit referred to makes no such groupings as it does in the case of douglas fir and the true firs.

While action taken by the Bureau of standards is persuasive in a case of this character, it is not necessarily controlling on the Federal Trade Commission or the courts. There may be cases in which the action of the Bureau should be regarded as decisive. As said by the Circuit court of Appeals, Seventh Circuit, in a recent case, Kirk & Co. v. Fed. Trade Comm., 59 F. (2d) 179, 183:

"We deem it quite pertinent and decisive of the question before us. The Government, through its agency, the Bureau of Standards, has thus committed itself to the proposition that castile soap may be made of oily and fatty elements other than olive oil. Being solely a question of fact, we deem it expedient for other departments of the Government, including the judiciary, to accept such construction, if for no other reason than that of consistency."

It would not necessarily follow from this decision that a yellow pine might be sold as a white pine if such sales were unfair to the trade and injurious to the public, notwithstanding the Bureau of Standards had specified a name such as "California white pine" in a list of "Standard commercial names" for pine lumber. It would be different, however, if the particular lumber sold under such name possessed substantially the same qualities possessed by the white pines of commerce as distinguished from certain well-known commercial yellow pines.

As shown by Bulletin 556 of the U. S. Department of Agriculture (respondent's exhibit 21) in the physical properties of weight, stiffness, strength, hardness, and shrinkage, ponderosa compares favorably with strobus. Expert witnesses from the United States Forest Products Laboratory place ponderosa in its mechanical properties with the typical white-pine lumbers. There appears to be no serious question in this respect.

A statement by E. P. Ivory, formerly with the U. S. Forest Service, a witness called by the Commission, succinctly presents certain facts:

"There are 37 pine species in the United States, and just as the oaks are divided into white and red oak groups, so the pines are divided into white and yellow pine groups. Botanically, California white pine falls in the yellow-pine group, chiefly because it has three long needles in each bundle, whereas the white pines have five. The physical properties and uses of the wood cut from this tree, however, align it with the white-pine group and set it apart very distinctively from the yellow-pine group."

From the testimony of this witness there also appears the statement:

"Physical properties of California white pine, as demonstrated in tests made at the U. S. Government Forest Products Laboratory, Madison, Wisconsin, and its uses, closely align California white pine with the botanical white pines. In fact, in many of its most important qualities and uses California white pine is more typieally a white pine than are some species which botanically are classified as white pines."

The finding of the Commission to which objection is principally directed as not being supported by the evidence reads:

"True white-pine lumber is far more durable than ponderosa lumber when exposed to weather conditions. The ponderosa pine has on an average a far greater amount of sapwood than trees generally used for lumber. The sapwood of the ponderosa is less durable than any other part of the tree—especially when exposed to weather conditions. It is the sapwood of the ponderosa that most closely resembles the heartwood of the true white pines in appearance and softness. It is the sapwood of the ponderosa that is usually sold for uses and purposes for which the heartwood of the true white pines is celebrated. The close resemblance between the heartwood of the true white pines and the sapwood of the ponderosa above noted is one of the greatest causes of the confusion and deception in the marketing of the two species."

The gist of this finding is that true white-pine lumber is far more durable and has a far less percentage of sap-

wood than ponderosa lumber, and that the close resemblance between the heartwood of true white pines and the sapwood of ponderosa is one of the greatest causes of confusion and deception in the marketing of the two species.

An exhibit in the record discloses that the sapwood of the true white-pine tree appears to be about 1¾ inches in thickness as compared with three inches for the yellow pine. The relative percentage of sapwood in a particular tree depends largely upon its diameter. The attention of the court is directed to a chart showing a strobus tree 9½ inches in diameter to have 60% sapwood, while a ponderosa tree 18 inches in diameter has 55% sapwood content, and trees of 21 inches in diameter have a sapwood content of 30% and 48%, respectively. While these figures are interesting as showing the proportion of sapwood and heartwood content of logs, they do not necessarily indicate the relative proportion of sapwood and heartwood content in the lumber produced therefrom. That there is a greater percentage of sapwood content in ponderosa lumber than there is in the true white-pine lumber there is no question. This variation, however, appears to be of importance only as it has a bearing upon the relative durability of the two classes of lumber. It is the sapwood which was found by the Commission to be more subject to decay when applied to exterior uses.

Upon the question of durability of ponderosa as compared with the true white pines the testimony of a number of witnesses appears in the record. A reference to the testimony of a few only will be sufficiently illustrative. Russell F. Whitehead, a New York City architect and

editor of an architectural journal, testified that lumber made from ponderosa "is not a satisfactory substitute for genuine white pine to use in exterior of a building, in any way, shape, or form." The witness further testified that he regarded it as reasonably satisfactory for interior purposes, "but not if exposed to the weather." W. B. Greeley, for seven years Chief Forester of the United States and now manager of the West Coast Lumberman's Association, Seattle, testified: "The genuine white pines have the reputation for greater durability in uses exposed to the weather. That would not apply to interior uses protected from the weather." George W. Kelham, for twenty-two years an architect in San Francisco, testified as to the use of ponderosa where exposed to the weather: "It is unsatisfactory under those conditions, and that would be the general opinion of the architects that I know. * * * It doesn't, in our opinion, last well. It decays more rapidly than other wood."

Professor C. P. Winslow, Director of the United States Forest Products Laboratory at Madison, Wisconsin, since 1917, to the question, "What is the difference between white pine and Pinus ponderosa as to durability?" answered: "I don't know."

Professor G. M. Hunt, of the same laboratory, testified: "The general experience with the use of the white pines during the 200 years since they began to be used indicated that these pines had moderately high durability. The general experience with Pinus ponderosa indicated that that wood had low durability in contact with the ground or any place favoring the growth of decay. That is a matter of common knowledge."

To the question, "Have there been tests which will adequately settle the question as to the relative decay-resisting qualities of the heartwood of Pinus ponderosa and the heartwood of Pinus strobus?" Professor Hunt answered: "There have not."

The weight to be given to testimony above outlined upon the question of the relative durability of the two lumbers is not as clear as it might otherwise seem to be, viewed in the light of other facts and circumstances. The expression that ponderosa lumber is not a satisfactory substitute "for use in exterior of a building, in any way, shape, or form" may well be viewed in the light of the fact that buildings erected from lumber from the original northern white-pine forests have withstood the elements for two centuries, while but few, if any, erected with lumber from the ponderosa tree may lay claim to an age in excess of about seventy-five years. Specific instances of decay under ordinary conditions of upkeep are almost wholly lacking in the record. The Director of the Forest Products Laboratory did not know what the difference in durability is. Professor Hunt's testimony was to the effect that it was a matter of common knowledge from general experience that ponderosa "had low durability in contact with the ground or any place favoring the growth of decay." As most of the lumber used even for exterior purposes does not come in contact with the ground, it would not necessarily follow that such lumber might not in other respects have moderately high durability unless the witness meant to say that any exterior use was a "place favoring the growth of decay." The testimony of the witness does not appear to warrant the latter

interpretation. What the testimony appears to establish is that northern white pine has relatively a greater durability for exterior use without establishing any comparative degree of such durability.

Upon the question of public confusion in the matter of lumber nomenclature, the testimony of a number of witnesses appears in the record. Mr. Alfred Busselle, for twenty-five years a practicing architect in New York, specializing in high-grade residential work, testified "In my experience there is a great deal of confusion in the pine market due to the terminology, and some of the confusion is quite honest. * * * I know that California white pine connotes to some people a distinct type of wood, but it connotes to other people white pine in general, and therein lies the confusion." Those who are confused, generally speaking, the witness testified, were the "millmen and the lumber dealers, as well as the architects." Just why architects and lumber dealers should be confused in view of the aid and assistance furnished by the Government through the Bureau of Standards is not readily apparent. It may properly be assumed that architects have a general knowledge of the qualities of the various materials they specify. If it is deemed important that a particular residence or other building be constructed of so-called true white pine because of its known or claimed superior wearing or other qualities, a reference to the standard commercial names, "northern white pine", "Idaho white pine", or "sugar pine", will enable the architect to so specify and the contractor and dealer to comply with the specifications. The testimony does not support a view that when architects so specify there is any confusion

or even any material amount of intentional substitution of some other lumber than that specified. It is clearly established by the testimony that the true white pines are sufficiently well known in the trade to be able to command a higher price over that sold under the trade name of California white pine or pondosa.

The testimony of a number of witnesses engaged in the retail trade in various States is to the effect that orders for white-pine lumber without other designation, would be filled by any lumber using the designation "white", including California white pine. It does not appear, however, from the testimony of these witnesses that in filling such orders with California white pine, or with other lumber using the designation "white", and which was not a botanically true white pine, a practice prevailed of charging a price therefor on a basis of the market price for northern or Idaho white pine.

P. J. Curley, president for five years of a wholesale and retail lumber house at Chicago, testified:

"It is commonly known among the sash and door men if a specification comes in for white pine, they will furnish California white pine or so-called 'western pine' or 'pondosa pine', without attempting to get the genuine northern white pine or Idaho white pine."

The reason for the substitution, the witness testified, "is the lower price, lower cost to the sash and door men or to the interior men." The amount of such substitution the witness estimated at "about ninety-five percent."

If it be considered that manufacturers of sash and doors and exterior trim use ponderosa lumber principally in such

manufacture, and supply the same when the specification calls for white pine, the important question remains of the character of material so supplied, and whether a price is charged therefor based on the difference in cost of the two lumbers. There is no testimony touching the question of price of this particular character of manufactured product. With the exception of the possible question of durability, the materiality of which has not been established, it does not otherwise appear the public is injured by action of such manufacturers. If, as testified by the witness Curley, these manufacturers use ponderosa pine as readily as they do California white pine in filling specifications calling for white pine, it is not apparent that an affirmance of the Commission's orders would afford any relief if injury from such manufacture in fact occurs.

In the finding of the Commission complained of appears the statement: "It is the sapwood of ponderosa that most closely resembles the heartwood of the true white pines in appearance and softness." In respondent's brief appears the statement: "True white pines excel ponderosa in the soft texture of the wood as an average * * *." The court's attention has not been called to any tests made of the relative hardness of heartwood as compared with sapwood. The tests made by the United States Forest Products Laboratory for "hardness (side section)" show ponderosa softer by 2% and "(end section)" softer by more than 6% than strobus. In comparison with the southern yellow pine (longleaf) both woods are softer by more than 50%.

As bearing on the question relative to the contention that the use of the commercial name "California white pine"

is unfair to the trade, we quote the following excerpt from the brief of respondent:

"Idaho white pine in 1922 and 1923 had a premium of $16 or $17 per thousand feet. Since the decline of 1927 the premium has been but $5.50 to $8.50. In September 1927 the Weyerhaeuser Sales Company made a drastic cut in Idaho white pine largely for the reason that the Weyerhaeuser concerns 'had come to the conclusion that, because other woods not true white pines were being marketed under the white-pine name, it was no longer possible to get the price preferences that we had previously gotten.'"

It may be noted, however, in connection with the foregoing statement, that the reduction in price did not occur until three years after the commercial name of half of the ponderosa of commerce was changed from western white pine to pondosa.

It may be conceded that if the use of the commercial name California white pine is prohibited in the lumber trade, northern white pine and Idaho white pine will be able to command a higher price than that which now prevails over lumber produced from the forests of ponderosa pine. If this situation be conceded, and it be further conceded that the increased price of strobus lumber finds a correlative reduction in the price of ponderosa lumber, the further question remains whether such change in commercial methods of sale will be in the interest of the public.

The case of Federal Trade Commission v. Winsted Hosiery Co., 258 U. S. 483, is stressed in the brief of respondent as one presenting a "remarkable parallel" respecting the use of unfair methods, the prevention of

which is in the interest of the public. From the opinion we quote the following excerpt:

"A substantial part of the consuming public, and also some buyers for retailers and sales people, understand the words 'merino', 'natural merino', 'gray merino', 'natural wool', 'gray wool', 'Australian wool', and 'natural worsted' as applied to underwear to mean that the underwear is all wool. By means of the labels and brands of the Winsted Company bearing such words, part of the public is misled into selling or into buying as all wool, underwear which in fact is in large part cotton. And these brands and labels tend to aid and encourage the representations of unscrupulous retailers and their salesmen who knowingly sell to their customers, as all wool, underwear which is largely composed of cotton."

The sale or purchase of a material as all wool which in fact is in large part cotton presents a situation which may not be said to be parallel to that presented upon the facts in this case. If a material from a gray wool from some other breed of sheep than a merino were dealt with in commerce under the name of "merino" or "gray merino", then there might be some parallel between the two cases.

In the case at bar we are considering questions as between certain pine lumbers. The use of the word "white" is here sought to be prohibited in connection with the trade name of a lumber produced from a certain species of pine tree which botanically falls within the yellow-pine group but which in its industrial utility comes within the white-pine group as known to commerce and industry. In the field of commerce and industry there are but two groups

of pine lumbers—the white and the yellow. Primarily this grouping reflects the industrial utility of the several lumbers. While botanically Pinus ponderosa falls within the same general classification as Pinus palustris, the lumber from which latter trees first became known to commerce as southern yellow pine, ponderosa in industrial utility possesses more nearly the qualities of Pinus strobus, which as northern white pine was the first of the pines known to commerce using the designation "white."

It may be conceded that the evidence establishes that northern white pine lumber from the forests of Minnesota, and Idaho white pine lumber possess certain qualities which make those lumbers a superior grade to lumber produced and sold as California white pine. When we compare Idaho white pine with northern white pine we find that the Department of Agriculture (exhibit 21) records the former as possessing greater strength and stiffness, but with all a softer quality. As said in the brief for respondent: "Lumber is a product of growth, not an inorganic, chemical product. Lumber from any given species, even the most uniform, will vary somewhat in quality. Where species are similar in average quality, or where the variations in a species are great there will be some overlapping." In considering California white pine with northern white pine, for example, the fact may not be overlooked that the greater portion of the annual production of such lumber, 467,000,000 board feet, comes from second-growth timber. Concerning this second-growth lumber, in the brief of respondent, we read: "While most of the new growth of strobus is being prematurely cut and used for

inferior purposes, yet doubtless many areas are being allowed to stand for their maximum value." This statement is suggestive of the fact that the public interest is not promoted by the premature cutting of second-growth timber.

In considering the fact that certain of the so-called true white pines produce lumber superior in certain respects to that produced from ponderosa, there is also to be considered the fact that these species of true white pines differ also from each other as the so-called true yellow pines differ from each other. Whatever these differences are, in commerce and industry pine lumber is classified into two groups, white pine and yellow pine, and any lumber falls within one or the other of these two main groupings, largely if not entirely because of its peculiar industrial utility.

In considering the weight to be given to the fact that ponderosa is not only not a botanical true white pine but in certain respects is also inferior in a more or less uncertain degree to certain of the true white pines of commerce, the past history as well as the future of the industry is deserving of consideration. The supply of the botanical true white pine is far more limited than that of ponderosa. The public is not only interested in not being deceived in the material it purchases under a certain nomenclature, but possibly in an even larger sense in the conservation of the forests. In the brief for respondent appears this statement:

"The superiority of true white-pine lumber over ponderosa has been reflected in the fact that northern white

pine, Idaho white pine, and sugar pine have all commanded a higher price on the market than ponderosa. The price differentials still continue."

It is manifest from this statement that, notwithstanding the fact that ponderosa has been sold in markets throughout the country under the commercial name "California white pine", and under other names using the word "white", for more than fifteen years prior to the institution of this proceeding, the so-called "true white pine" were able to command a higher price.

It is the conclusion of the court that, viewing the testimony in the light of all the facts of the case, it is insufficient to support findings that petitioners' use of the commercial name "California white pine" is an unfair method of competition or that its prevention would be in the interest of the public.

The orders complained of should be annulled and set aside. It is so ordered.